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No. 57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

W. E. HOWARD, JR.,
Petitioner,

v.

KENNETH T. LYONS and JOSEPH S. McATEER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENTS

CLAUDE L. DAWSON,
1049 Shoreham Building,
Washington 5, D. C.
Attorney for the Respondents.

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BRIEF FOR THE RESPONDENTS

This Court on June 9, 1958 (357 U.S. 903) granted the petition for a writ of certiorari in the above entitled cause. Respondents admit that this Court has jurisdiction in this case.

QUESTION PRESENTED

Whether the petitioner, a Rear Admiral, holding a rank far below that of a Cabinet Officer, who makes a report to his superiors in Washington, D. C., has an absolute immunity in releasing at the same time a copy of the report to members of Congress from Massachusetts, and to the

editors of the newspapers in the Boston, Massachusetts area, and which said report was a defamatory and malicious communication and libelous per se, and which said release was not any part of the official duties of the petitioner.

STATEMENT OF THE CASE

At the time this action arose, the petitioner was a Rear Admiral assigned to the Boston Naval Shipyard. The Federal Employees Veterans Association is an organization whose members are honorably discharged soldiers, sailors and marines who are employed in the Boston Naval Shipyard. The Respondent, Kenneth T. Lyons, is the National Commander of the organization, and the Respondent, Joseph McAteer, at the time in question was the Commander of the Boston Naval Shipyard Post of the organization. In their official capacity they represented the members of their organization in labor relations in the Boston Naval Shipyard. Since the year 1946, when the Federal Employees Veterans Association was first organized, the officials of that organization had represented their members in labor relations matters, and over a period of some nine years there had been more or less a friendly relationship between the employees and management. There were times when disagreements arose, but all of them were settled satisfactorily. There is no question about the loyalty of the Respondents to the government of the United States, or the loyalty of any of the members of the Federal Employees Veterans Association to the government of the United States.

On September 8, 1955, and shortly after his arrival to take charge of the Boston Naval Shipyard, the said petitioner deliberately, maliciously, recklessly, wickedly, and falsely issued a communication marked Exhibit "A" (Tr. R.15) to the Chief of Industrial Relations, Department of

the Navy in Washington, D. C. At the same time, he released a complete and true copy of the text to the members of Congress from the State of Massachusetts, and forwarded through channels a true copy of the text to J.A. Snackenberg, Rear Admiral Commandant First Naval District, who by affidavit stated (Tr. R.21) that through authorized routine it was released to the editors of various newspapers in Boston, Massachusetts. The petitioner knew that the usual routine that would be followed by the release of the communication to Admiral Snackenberg would be that it would be released to the press.

The question therefore involved in this case is whether the petitioner has an absolute immunity from releasing a libelous communication to members of Congress from Massachusetts, and to the editors of the various newspapers in the city of Boston, Massachusetts.

The communication by the petitioner to the members of Congress was not made in any response to any congressional inquiry, investigation, or legislative function of any of the members from Massachusetts. It was purely a gratuitous act on the part of the petitioner.

The statement on page 5 of the petitioner's brief is misleading as to the reason for the release of the communication to members of Congress that charges were made against the shipyard management. No charges were then pending against the shipyard management, and had not been for a period of time more than two years prior to the release of the libelous statement.

The District Court dismissed the action. Upon appeal, the Court of Appeals for the First Circuit reversed the judgment of the District Court holding that the petitioner in releasing the communication did not have an absolute immunity. Circuit Judge Woodbury dissented stating that the question was a close one.

SUMMARY OF ARGUMENT

The Respondents will argue that the petitioner, in releasing the communication which was addressed to the Chief of the Bureau of Ships, Chief of Industrial Relations (R. 8-15), acted beyond his official duties in releasing a copy of the said communication to the Members of Congress from Massachusetts, and to the editors of the newspapers in the Boston area. The Respondents will further argue that the communication in question contains language which is libelous per se and that malice is presumed. The Respondents will further argue, that in any event the immunity which the petitioner had in releasing the libelous communication was only qualifiedly privileged, and since the use of language in said communication which was libelous per se, malice is presumed, and that the majority opinion of the Court of Appeals for the First Circuit was proper and just in holding that the petitioner was responsible for his libelous communication.

ARGUMENT

The Respondents admit that certain decisions of the Courts clothe high officials of the United States government with a cloak of immunity in releasing libelous statements. This cloak of immunity protects officials of Cabinet rank and members of the judiciary. This absolute immunity against suit for libel and slander protects officials of the government establishing policies, and members of the judiciary so that they may fearlessly administer the functions of the offices which they occupy.

The rule of absolute immunity is not to be broadly applied, and while it applies to heads of Executive Departments of the government, it is not to be extended to public officers generally.

Iverson v Frandsen, 237 F.2d 898 10th CCA

The rule of absolute immunity was established by this Court in the case of *Kendall* v *Stockes*, 44 U.S. (3 How) 87, 98, and later in the case of *Spalding* v *Vilas*, 161 U.S. 483. In these cases this Court held that the President of the United States, the Governors of any State or Territory, and cabinet officers of the United States had an absolute immunity in issuing libelous statements which related to their official duties.

Some of the Judges of the Court of Appeals have questioned whether the Courts have gone too far in establishing this rule of absolute immunity. In the case of *Glass* v *Ickes*, 117 F.2d 273, where the Secretary of Interior issued a libelous statement, Judge Groner, while affirming the dismissal of the action on the grounds of immunity, among other things, said:

> "The necessity of the rule is obvious, but its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being. * * * I have felt some doubt about the correctness of the majority opinion. * * * It is quite true that both in this court and the Supreme Court the scope of official authority has been so broadly stated (Cooper v O'Connor) that I am unable to say that the Secretary's press release was not, in view of the general authority of the Secretary concerning the oil industry, a matter 'in relation to matters committed by law to his control' or at least 'having more or less connection with the general matters committed by law to his control', and, in this view I am compelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law. 'The ocean has its appointed bounds, and were it to break throught those limits, its plenitude would become a cataclysm which would engulf a continent.'"

While the Court of Appeals for the District of Columbia sustained the plea of absolute immunity in the case of *Glass* v *Ickes*, supra, a short time later the Court held in the case of *Colpoys* v *Gates*, 118 F.2d 16 that a United States Marshal was not accorded absolute immunity in reporting on one of his deputies.

The petitioner in this case was an administrative officer without policy determining functions. He had no political functions, and he was subject to the orders and the policy making decisions of the Secretary of the Navy, and the Secretary of Defense. To extend absolute immunity to the petitioner would mean that hundreds of military and naval officers in charge of small or large establishments would also be entitled to absolute immunity and open the door so that hundreds and even thousands of loyal Americans could be libeled without any recourse against these inferior officers.

The petitioner relies upon cases which involve Cabinet officers, and while Respondents believe that the Courts have gone too far in throwing a cloak of immunity around Cabinet officers and particularly where the libelous statements were clearly false and malicious, the Respondents do not dispute the rule that if the petitioner had been a Cabinet officer he would be entitled to absolute immunity under the decisions of this Court. This, even though Respondents doubt their soundness, and with the hope that some day this Court will modify the decisions where acts of Cabinet officers are clearly malicious. The public is entitled to protection as well as high ranking officials.

It has been held certain inferior officers of the government such as this petitioner are not entitled to absolute immunity.

City of Mullen for the use of Jones v Davidson et al
West Va. 57 S.E. 2nd 1, 13 A.L.R. 2nd 887
See collected cases 13 A.L.R. 2nd pages 897-903
33 Am. Jur. Par. 143, Page 140

The brief of the petitioner rests their case primarily on the right of the petitioner to release the communication to the Members of Congress from Massachusetts. No showing is made that any member of Congress to whom the copy was sent requested such a communication. No showing is made that at the time that the release to the Congressmen that there was pending before Congress any matters under investigation in the Boston Naval Shipyard, nor was the communication in reply to any letter or inquiry by the Congressmen. It was purely and simply a gratuitous act on the part of the petitioner in an attempt to discredit the Respondents, and the Federal Employees Veterans Association.

The Respondents rely not only on the release to the Members of Congress from Massachusetts, but also on the release of the libelous communication to the editors of the daily newspapers in the City of Boston. The Court's attention is directed to the affidavit of J. A. Snackenberg (R.21, par. 6). Please note that this affidavit states that the release to the editors of the various newspapers in Boston, Massachusetts was an authorized routine. Therefore the petitioner knew that upon furnishing a copy of the communication in question it would be released to the press of the City of Boston. The petitioner set in motion the release to the editors of the newspapers in Boston, Massachusetts. There is a general agreement among the authorities upon the broad proposition that one who publishes a dafamatory statement is liable for injurious consequences of the repetition thereof by third parties where such repetition is the natural and probable result of the original publication.

33 Am. Juris. Section 197, page 185

The following case illustrates the modern rule in libel cases.

In the case of Matteo v Barr the defendant was the Acting Director of the Office of Rent Stabilization. The

plaintiff Matteo was an employee. A terminal leave bill which the plaintiff had sponsored was before Congress. The defendant had opposed the plan. Without his knowledge, the defendant's secretary signed a letter approving the plan. When this fact was ascertained by the defendant he issued a press release, and he was then sued for libel. He defended upon the ground that his release to the press was absolutely privileged. The plaintiff recovered a judgment against the defendant, and an appeal was taken. The judgment was affirmed by the Court of Appeals (244 F.2d 767), and upon petition for certiorari, which was granted, this Court on December 9, 1957 reversed the judgment of the Court of Appeals (355 U.S. 171) but only on the ground that the Court of Appeals refused to consider the question of whether the press release was qualifiedly privileged. Since the remand from this Court, the Court of Appeals has again considered this case and held that the defendant had a qualified privilege in releasing the story to the press. This decision was rendered on June 12, 1958, and the case was remanded to the District Court as to whether the defendant lost the privilege by reason of malice or lack of reasonable grounds to believe that the contents of his publication were true.

The case of *Pearson* v *Wright* (U. S. Dist. Court D.C.) decided on November 8, 1957, 156 Fed. Supp. 136 by the distinguished jurist Holtzoff is particularly applicable to the situation in this case insofar as it relates to the release of the communication to the editors of the newspapers in Boston. In that case the defendant was the Chairman of a Commission on Governmental Security. The Chairman of Government Information Subcommittee of the House of Representatives sent a communication to the defendant in his official capacity in which certain information was request which related to matters within the scope of the commission. The defendant replied to the chairman of the Congressional Committee giving the information requested. The alleged defamatory statements were contained in this letter.

The Court held that the head of a government agency or bureau has a duty to respond to information requested by the Chairman of a Congressional Committee, and that absolute privilege attaches to the communication. The second count of the complaint was based upon the defendant's statement to the press. The Court held that statements to the press made by a governmental official are not absolutely privileged and that such an official may be held liable for such a statement if it contains defamatory statements. The petitioner in this case, having set in motion a release to the press in Boston, Massachusetts, is liable for releasing the communication to the press. He is also liable for his release to the Members of Congress from the State of Massachusetts.

There is also a rule of law which requires a person who releases defamatory statements to make a fair and reasonable report.

Robinson v Johnson, 239 Fed. 671, 152 CCA 505, 8th CCA

The protection afforded the maker of an allegedly libelous statement who seeks a claim of qualified privilege is lost in the presence of malice on the part of the maker.

Maurice v Worden, 54 Md. 233 (Supt. of Naval Academy)
Gray v Mossman, 88 Conn. 247, 90 A. 938
Peterson v Steenerson, 113 Minn. 87

One who issues a libelous statement in bad faith and with malice presents a question of fact for the jury under the laws of Massachusetts.

Wright v Lathrop, 149 Mass. 385, 21 N.E. 963 (1889)
Hupfer v Rosenfield, 162 Mass. 131, 38 N.E. 197 (1894)
Doane v Grew, 220 Mass. 171, 107 N.E. 620 (1915)
See Also:
Stevenson v Morris, 288 Pa. 405, 136 A. 234

Cf. Bereman v Power Publ. Co., 93 Colo. 581, 27 P (2d) 749

Kroger Grocery & Baking Co. v Yount, 66 F.2d, 700 (CCA 8th)

In Robinson v Johnson, supra the defendants published extracts from a report signed by the Assistant Secretary of Interior, and asserted that he was absolutely privileged to do so. The Court of Appeals for the 8th Circuit held that the publication was neither fair nor reasonable.

The communication which the petitioner prepared for his superiors in the Navy Department in Washington was neither a fair nor a reasonable report, and the comment and charges filed against the Respondents were clearly defamatory and libelous per se.

The Report Of The Petitioner Was Neither Fair Nor Reasonable; And Was Clearly Malicious Being Libelous Per Se.

Let us now examine the contents of the libelous publication which the petitioner released to the Members of Congress from Massachusetts, and to the Editors of the newspapers in the City of Boston, Massachusetts.

The libelous publication is set forth on pages 8-15 of the Record. It is marked exhibit "A", and was attached to the complaint filed by the Respondents. The Court's attention is directed to the entire exhibit but it is deemed proper to invite the Court's attention to certain paragraphs in the communication which are believed to be libelous per se. On page 11 of the record, it is stated in this communication in part:

> "Federal Employees Veterans Association Post No. 1, has a prime purpose the use of this publicity medium not alone to thwart the aims of shipyard administration in the accomplishment of its mission, but to further personal aims and self interests of those guiding hands of the Federal Employees Veterans

> Association, who, coincidentally are shipyard employees, and at least one of whom is a supervisor, and therefore a member of shipyard management."

On Page 12—

> "They wonder why a management which must be considered sound since the Navy Department condones its existence continues to permit a condition which amounts to OVERT SUBVERSION to exist, operate and even to thrive among a relatively small but nevertheless readily identifiable group of shipyard employees. They recognize a weakness either in management or in the system by which management must perforce be guided. General morale is affected, and obviously, adversely."

In justification for the defamatory communication of the petitioner there was attached to the petitioner's brief in the Court of Appeals below an appendix showing a release made by the Federal Employees Veterans Association. This release is set forth on pages 26 to 35 of the Record.

Let us now examine this release of the Federal Employees Veterans Association to see if there is any justification for the charge that the Respondents actions amounted to "obert subversion" as referred to in the libelous communication issued by the petitioner.

On pages 26 and 27 reference is made to the National Convention of the Federal Employees Veterans Association, and the dinner. Anything subversive about having a National Convention and a dinner? On page 27 reference is made to the rope walk which as a matter of fact had been in existence practically since the Navy Yard at Boston was in operation. The statement related to an alleged attempt to close this shop. Anything subversive in trying to retain in the Shipyard employees who were in the rope walk? On pages 27 and 28 complaint is made about the refusal of annual leave after employees had planned and paid for cottage rent during the usual sum-

mer vacation period. Anything subversive about complaining about vacation periods? On page 28 complaint is made about the failure to close the shipyard when the summer heat reached the 100 mark, and a higher temperature where the employees were working, and attention was called to the fact that the governmental employees at Watertown Arsenal, and other places, had been released. Is there anything subversive about such a complaint?

On page 29 reference is made to the restoration of some 100 employees at the Hingham Naval Ammunition Depot who were restored by Court order. Is there anything subversive in reporting that the organization which Respondents represent had been successful in a lawsuit, or was it subversive to use the Courts to enforce the rights of employees? The very purpose of the organization is to protect the rights of the employees under the Civil Service laws of the United States and the Veterans Preference Acts.

On page 30 a statement is made about a wage survey with the information that a wage raise had been given to employees at the Bethlehem Steel plant. The blue collar workers who belonged to the organization represented by the Respondents were entitled to a wage in conformity with what was being paid like workers in private industry. Is it subversive to ask for a wage raise in accordance with the law under which the blue collar workers were entitled to a raise?

On page 31 a statement is made about promotional policies where employees with higher ratings and better qualified were not promoted apparently because they were Jews. IS it anything subversive to protest that the employee who had a higher rating was not promoted?

It is not necessary to recite all contained in the memorandum referred to in petitioner's brief before the Court of Appeals. The rest of the exhibit which was attached to

show that the Respondents were "subversive" relates to a physician who told a veteran of the Korean War who reported for treatment that he ought to go back to the jungle. A report about the hurricane and the cafeteria, all of the matters discussed in the memorandum which the petitioner claimed were "subversive" relate to matters ordinarily discussed by labor and management representatives.

The words "overt subversive" are actionable per se.

State ex rel Kelly v Whienant, (Fla.) 80 So. 2nd 611, 612
Thompson v Wallin, 95 N.Y.S. 2nd 784, 789, 276 App.Div. 463

Malice is presumed where the words are actionable per se.

26 Words & Phrases Judicially defined page 230, under Libel & Slander.
Doane v Grew, 107 N.E. 620, 622, 220 Mass. 171
State Ex rel Kelly v Whienant, supra.

Based upon the appendix to the petitioner's brief in the Court of Appeals setting forth the reasons for the libelous communication it is believed that no fair minded person could seriously contend that the matters of which the petitioner complained about the Federal Employees Veterans Association, as shown by the exhibit attached to the brief (R. 26-35), were in fact justified, but that the petitioner not only departed from the truth in describing the activities of the Respondents but that his actions were motivated by malice and a lack of reasonable grounds to believe that the contents of his publication were true statements of fact. The charge that the activities of the Respondents amounts to overt subversion is about as despicable a statement as could be made of two loyal American citizens, both of whom had served their country in time of war and received honorable discharges, and the Respondent Lyons was not only in World War II but also

in the Korean War. Their loyalty to the United States cannot even be doubted.

Is this Court going to grant to the petitioner the right with complete immunity in the future to libel others who are loyal citizens of the United States? If this case is reversed, a license to that effect will be issued.

On pages 28 and 30 of the petitioner's brief Counsel for the petitioner almost tearfully pleads that no inferior officers of the government should be subject to libel suits. They should not even be "qualifiedly privileged". They must have complete immunity. There is one sure way that they can have complete immunity from suits for libelous statements, and that is to abstain from making libelous statements about their employees or other persons. The public is entitled to protection against officials who issue malicious libels. Is it too much to expect from public servants that their conduct be such that they will not maliciously libel the public for whom they serve or the persons over which they have supervision?

CONCLUSION

In the interest of right and justice the judgment of the United States Court of Appeals for the First Circuit should be in all things affirmed.

Respectfully submitted,

CLAUDE L. DAWSON,
1049 Shoreham Building,
Washington 5, D. C.
Attorney for the Respondents.